

**38 Ebb Tide Cove
Fenwick Island, Delaware 19944**

August 11, 2018

302.539.3532/ vlcarmean@verizon.net

Via OpenGovernment@state.de.us

Department of Justice
Attn: Kim Siegel, MPA, FOIA Coordinator
820 North French Street
Wilmington, DE 19801

RE: FOIA Rebuttal Correspondence from the Town of Fenwick Island

Dear Ms. Siegel:

This letter is to reply to the recent email we received from the Town of Fenwick Island dated August 9, 2018, responding to the August 6th FOIA complaint from Council Members Carmean, Lee, and Williams. In the August 6th complaint we alleged that important town business was **not** performed in an “open and public manner” so that Fenwick’s citizens (and Council members) could monitor the decisions made by “officials in formulating and executing public policy.”

As per the original instructions we received from the DOJ, we have decided to err, if need be, on the side of providing an addendum to correct the misimpression given by Mary Fox, Esquire that our complaint was based on the non-FOIA area of zoning. While our complaint may have arisen out of a zoning situation, it is the **process** that was used by a group of five people to conduct town business secretly that is the focus of our complaint. Therefore, please do not be confused by Ms. Fox’s August 9th submission whereby she appears to dismiss our allegations of a FOIA violation by attempting to recategorize it as a different complaint altogether. To be clear, the sole intent of our August 6th complaint was to focus on a “de facto” variance secretly made by a small group of town officials which disenfranchised the residents of Fenwick Island from their right to notice and opportunity for public comment to any variances sought under the Town Code.

After reading the 27 pages of email exchanges by Mary Fox, Esquire, Town Manager Tieman, Building Official Schuchman and Building Committee Chair Weistling (all of whom were

apparently making decisions supported by President/Mayor Langan) that the Town's existing 32 foot building height ordinance was waived/voided to allow adding an additional 6 feet for HVAC mechanics on the roof of a proposed new hotel structure, we contend that under Fenwick's **Code** these individuals do not have the right to change or void **any existing** codes without involving Council, the Charter and Ordinance Committee and/or the Board of Adjustment, all of which would ensure public notice and comment.

To make a decision about the building permit in question or for any new construction costing more than \$20,00, the building permit application needs to be submitted to the Building Committee as stated in the Town **Code, Chapter 61- 3B**. This application should have triggered a meeting of the Building Committee, which needs to be posted and made public in order to solicit public comment. However, there was no posting of a meeting, no meeting of the Building Committee and certainly no minutes. Rather, the Building Official made a decision, the chairman supported that decision and a member of the committee signed.

Whether or not this is how things have been done in the past is not relevant. This was not done in an open manner following the procedures set out in the **Code**. No legal attempt was made to communicate this change to the Council or community in an "open and public manner."

As recently as 2017 and 2018, the same lawyer, Mary Fox, Esquire approved the wording of new building height regulations as well as many definitions in the *Chapter 160 – Zoning* from the **Code of the Town of Fenwick Island**. During the process of review, the Town of Fenwick made clear that the ordinances intended a strict 32 foot maximum height requirement, with limited exemptions being made for chimneys, wind turbines and solar panels. No other intent could be interpreted from the review process.

The attorney for the owner of the commercial property in his communications with Ms. Fox acknowledged the application of the strict height restriction as he was seeking **variances** for the HVAC ventilation stacks and elevator shaft. However, despite the property owner acknowledging the recognized strict height restriction, Ms. Fox unilaterally decided that those regulations pertaining to height restrictions were now a "gray area" and thus could not prevent a HVAC unit from being placed on a 32 foot roof. Ms. Fox conveyed to the owner of the commercial property that the property was permitted to violate the 32 foot height restriction without further notice or solicitation of public comment. Four individuals supported this decision and included T. Tieman, P. Schuchman, Wm Weistling and G. Langan. Indeed, William Weistling recognized the departure from regulatory process as well as the residents' right to notice and comment, when he wrote around July 6th: "How to proceed from here. Pat and I can

decide either way or have Council get involved. Due to possible litigation, it could be discussed in an executive session... Public reaction could be strong..."

At the last Regular Council Meeting on July 27th, the undersigned made another attempt to have the height decision-making process explained to the public by invoking Section 12 from the **Charter**, which notes: *Special meetings may be called by the President and shall be called by him upon written request of three (3) members of the Council. Special meetings shall be called in such manner and at such time as shall be prescribed by Ordinance or resolution of the Council, and the call may be either written, telegram or oral as designated by ordinances or resolution. (59 Del. Laws, c. 65, ¶ 7).* On Tuesday, July 31st, Council Member Carmean, with input from the two other Council members below, communicated with the Town Manager and created an agenda for such a meeting. However, the President/mayor of our Councilmanic organization has so far refused to honor the request.

The three of us who are filing this complaint are neither clever wordsmiths nor lawyers. We are individuals who simply want to represent the Town's residents the best way possible by adhering to the laws we promised to uphold. Collectively, the three of us have served on the Town's Council for more than twenty years. None of us have ever experienced such an over-reach of power and decision-making as we have described herein this letter and in the original complaint. All other code changes have followed a **process** described in the **Code which allow for public notice and comment**. Perhaps, if the DOJ requests the earlier referenced 27 page file of original emails, the DOJ will understand why we are objecting to a **process** that was used in in this matter. In short, a few individuals were able to void an approved ordinance and did so without complying with Town **Code** and, by doing so, effectively circumvented the requirement for public notice and comment.

We hope that this letter will further clarify our concerns and our complaint. Please do not hesitate to contact us if more information is needed.

Sincerely,

Vicki L. Carmean
Council Member

Julie Lee
Council Member

Roy Williams
Council Member